

*Final Report  
of the  
Blue Ribbon Group*

*June 1, 1999  
Frankfort, Kentucky*

**"Improving Indigent Defense for the 21<sup>st</sup> Century"**  
sponsored by the public advocacy commission and kentucky department of public advocacy

Final Report  
of the  
*Blue Ribbon Group*

June 1, 1999  
Frankfort, Kentucky

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## ***Executive Summary***

The Department of Public Advocacy (DPA) is a statewide entity responsible for overseeing the delivery of indigent defense services in Kentucky's 120 counties. A 12-member Public Advocacy Commission assists the DPA with budgetary and certain supervisory responsibilities and conducts public education about the purpose of the public advocacy system. The Department of Public Advocacy with its history of strong leadership and sound structure is one that is poised for excellence. Unfortunately, the agency has been plagued with under-funding for many years, making it impossible to fulfill its potential as a legal services provider.

After several efforts to study and document the effects of chronic under-funding (including several studies conducted by The Spangenberg Group) and relatively little official response to remedy the situation, in 1998, Public Advocate Erwin W. Lewis spearheaded the formation of a *Blue Ribbon Group* to develop a strategy for improvement. The Kentucky *Blue Ribbon Group on Improving Indigent Defense in the 21<sup>st</sup> Century* consists of more than 20 distinguished members representing all three branches of government, the bar and key officials of criminal justice agencies across the state (the membership of the group appears in Appendix A of this report). The Group adopted a clear-cut mission statement:

***To address the chronic problems of the Kentucky public defender system and propose solutions in light of national information and standards, in order to create a strategy for ensuring an appropriately funded indigent defense system for the 21<sup>st</sup> century.***

To assist the Group in its mission, the DPA contracted with The Spangenberg Group (TSG) of West Newton, Massachusetts, to assist the members by providing detailed information from other states regarding many of the issues that were placed on the table by the Blue Ribbon Group. The Spangenberg Group is a nationally recognized criminal justice research and consulting firm specializing in the delivery of indigent defense services. During the past 15 years, The Spangenberg Group has worked with task forces and commissions in more than half of the states in the country. The Spangenberg Group was retained on this project through a federal Edward G. Byrne Memorial grant awarded to DPA by the Kentucky Justice Cabinet.

The Blue Ribbon Group met on three occasions. The first meeting was held in Frankfort at the Kentucky Bar Association Headquarters on March 5, 1999. The second meeting was held in the same place on April 23, 1999, at which time the Blue Ribbon Group voted on a number of recommendations. The final meeting was held on May 25, 1999, when the Group endorsed this report and the recommendations contained in the final chapter.

TSG selected 19 states<sup>1</sup> for comparison with Kentucky. The states were selected on the basis of six criteria:

1. States in close proximity to Kentucky;
2. States with fully state-funded indigent defense systems;
3. States organized and administered at the statewide level;

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<sup>1</sup>The states selected were Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Tennessee, Virginia, West Virginia and Wisconsin.

4. States with regional public defender offices;
5. States that have the death penalty; and/or
6. States that collect reliable data at the statewide level.

A number of key indicia were gathered from the 19 states for comparison with Kentucky, including:

- the total statewide number of indigent defense cases handled in fiscal year 1998;
- a breakdown of the statewide indigent defense caseload by case type;
- the total statewide expenditure for indigent defense including public defender programs, court-appointed counsel and contract defenders in fiscal year 1998;
- the portion of each state's indigent defense expenditure provided by the state;
- the indigent defense expenditure provided by counties; and
- the total amount of money generated for indigent defense programs through additional, non-general fund revenue sources in fiscal year 1998.

Results of the comparison show that Kentucky ranks among the worst in the nation in key indicators such as indigent defense cost-per-capita, indigent defense cost-per-case, and public defender salaries. Starting salaries for public defenders in Kentucky were the lowest among the states surveyed - \$23,388. The stark disparities in pay between Kentucky public defenders and public defenders from other states continue as attorneys gain more experience and assume greater responsibilities.

Public defenders in Kentucky carry caseloads that far exceed national caseload standards. High caseloads take an immediate toll on attorney morale and performance, calling into question the level of advocacy provided on behalf of clients. High employee turnover, and its accompanying perpetual state of hiring and training, has become a fact of life in several of the DPA offices.

The goal of the DPA for many years has been to have regional offices providing public defender representation in all parts of the state. The under-funding of the DPA has stymied this goal; thus, regional offices operate in only 73 of the state's 120 counties. In 47 counties, representation is provided by attorneys who are under contract with the DPA.

One of the ways in which Kentucky has attempted to deal with the under-funding of indigent defense services is to rely on various alternative revenue sources such as administrative fees, assessments and recoupment in order to avoid providing a greater general fund appropriation to the DPA. Currently the DPA receives supplemental funding from a \$52.50 administrative fee assessed on all indigent persons who are assigned a public defender or court-appointed attorney. It also receives 25% of the \$200 service fee assessed against all individuals convicted of drunk driving. Counties are required to assess 12.5 cents per capita to contribute toward a fund established to pay for expert witnesses and other necessary costs associated with providing indigent defense services. Recoupment collections ordered by the court are returned to the county in which they were ordered to help supplement the county assessment.

The percentage of alternative revenue funds Kentucky raises and dedicates to indigent defense ranks among the highest in the nation. In FY 1998, 15.2% of all funds for indigent defense

came from these alternative revenue sources. While this effort is laudatory, it is important to recognize that supplemental alternative revenue is not a replacement for adequate general funding. Indigent populations by definition do not have adequate funds to self-finance government provided services, and there will always be a percentage of indigent defendants who simply cannot afford to pay administrative fees or other court costs. We believe that Kentucky has achieved an impressive rate of alternative revenue, but that the Commonwealth must be realistic in recognizing this source of funds is strictly limited.

The Spangenberg Group views the DPA as a well-managed program that has made impressive strides despite its funding struggles. The DPA has recognized the importance of maintaining healthy and positive relationships with all three branches of government and has worked cooperatively with each agency in Kentucky's criminal justice system. This has occurred with a clear understanding of the agency's primary responsibility to the clients they represent following court appointment.

Furthermore, TSG believes that this administration has a sense of the urgency of managing the agency's funds on behalf of the public in an efficient and professional manner.

Among the many examples that illustrate this are the following:

1. The Public Advocate has regionalized the delivery of trial services across the state;
2. A substantial improvement has been made in defender education;
3. The DPA has, as in years past, been highly successful in the securement of federal funds, particularly regarding Byrne grants;
4. Serious attempts have been made by management to urge the increased collection of additional revenue through letters, telephone calls and visits to staff and judges;
5. Substantially improved computerized management information and case-tracking systems are now in place; and
6. The Public Advocate and the Deputy Public Advocate have spent hundreds of hours on the road visiting with key leaders in government and the criminal justice system, and explaining in a clear and responsive way the needs of the agency.

Set out below in summary form are the report's findings and recommendations. Full commentary is provided in the report.

## **Findings:**

**#1 – The Department of Public Advocacy is a Solid, Efficient, and Well-Managed Program.**

**#2 – The Department of Public Advocacy Has Implemented an Impressive Plan for the 1998-2000 Biennium.**

**#3 – The Department of Public Advocacy is Effective in Indigent Defense Cost Recovery Compared to Other States.**

**#4 – The Department of Public Advocacy Ranks at, or Near, the Bottom of Public Defender Agencies Nationwide in Indigent Defense Cost-Per-Capita & Cost-Per-Case.**

**#5 – The Department of Public Advocacy Per Attorney Caseload Far Exceeds National Caseload Standards.**

**#6 – The Department of Public Advocacy Ranks At, or Near, the Bottom of Public Defender Salaries Nationwide for Attorneys at All Experience Levels.**

**#7 – All Components of the Criminal Justice System Should be Adequately Funded Particularly Public Defense. Overall the Department of Public Advocacy is Under-Funded.**

**#8 – The Department of Public Advocacy is Experiencing Other Effects of Chronic Under-Funding.**

**#9 – Without Additional General Fund Revenues, a Deficit will Occur in the General Fund Account On or Before July 1, 2000.**

**#10 – The Appellate Branch is Limited in its Ability to Handle the Workload in the Court of Appeals and the Supreme Court.**

**#11 – The DPA Post-Conviction Branch is Unable to Provide Representation to Hundreds of Inmates Who Have the Right to Counsel in Kentucky.**

**#12 – As DPA Moves Toward a Fully Staffed Statewide Program, the Demands on the Law Operations Division (LOPS) Will Grow Dramatically. Currently, the Number of Staff at LOPS Will Need to be Expanded During the Implementation of PD21.**

**#13 – Compensation for Private Bar Members Who are Appointed to Conflict Cases is Among the Lowest in the Country.**

**#14 – Department of Public Advocacy Representation in Capital Cases Must Occur at the Trial, Direct Appeal, State Post-Conviction and Federal Habeas Corpus Level. As the Numbers of Death Penalty Case Findings Occur and Previous Cases Work Their Way Through the Four Stage Process, Additional DPA Resources Are Needed.**

#### **Recommendations:**

**#1 – Indigent Defense is a Necessary Function of Government, and an Essential and Co-Equal Partner in the Criminal Justice System.**

**#2 – The Kentucky Public Defender System Cannot Play its Necessary Role for Courts, Clients, and the Public in this Criminal Justice System Without a Significant Increase in Funding.**

**#3 – The Full-Time System should be completed.**

**#4 – Higher Salaries Should Be Paid to Defenders and Prosecutors; Salary Parity is the Goal.**

**#5 – Loan Forgiveness Programs Should Be Made Available to Prosecutors and Defenders.**

**#6 – Full-Time Trial Staff Should Be Increased to Bring Caseloads Per Attorney Closer to the National Standards. The Figure Should Be No More Than 350 in Rural Areas and 450 in Urban Areas.**

**#7 – The Department of Public Advocacy and the Court of Justice Must Increase their Efforts to Collect Reasonable Fees from Public Defender Clients, Including Considering the Use of Private Collection Organizations.**

**#8 – Prosecutor and Defender Increases Should be Considered when a Judicial Position is Added.**

**#9 – It is Important that Public Defender Counsel be Available to Children in Juvenile Court Proceedings.**

**#10 – It is Imperative that Kentucky Reasonably Fund Indigent Capital Defense both at the Trial and Post-Trial Levels.**

**#11 – Public Defender Services are Constitutionally Mandated while Resources are Scarce. It is Important for all Eligible Persons who want to be Represented by a Lawyer, but only those who are Eligible to be Appointed a Public Defender. The Court of Justice, and Especially AOC and DPA are Encouraged to Work Cooperatively to Ensure Appropriate Public Defender Appointments.**

**#12 – The \$11.7 Million Additional Funding for Each of the 2 Years Is Reasonable and Necessary to Meet DPA's Documented Funding Needs as Described in PD21.**

If the DPA's level of funding is not increased to that recommended by the Blue Ribbon Group, there are a number of likely consequences.

- The statewide full-time plan will fail and a large number of counties will continue to be served by part-time contract attorneys unable to assist the judges in keeping the docket moving and not providing required counsel to some juvenile delinquents and misdemeanants.

- An even larger number of lawyers and support staff will leave the program and seek other employment due to the woefully inadequate salaries available.
- Full-time public defender caseloads will increase to the breaking point, particularly in cities such as Louisville.
- DPA will not be able to provide representation to all indigent defendants in the state and will have to develop policies regarding courts that they cannot serve.
- Cases will have to be retried because of the inadequacy of counsel or the lack of counsel completely.
- The community will be frustrated, as well as all of the criminal justice agencies, because public defenders cannot perform their required tasks adequately.
- Without substantial additional funding, there is a likely risk that the Commonwealth of Kentucky could not adequately defend a statewide systemic lawsuit due to the inadequate resources and overwhelming caseload.

The Spangenberg Group firmly believes that the requested amount of \$11.7 million is reasonable, necessary and required. The Public Advocate's Plan for the 21<sup>st</sup> Century (PD21), and the work of the Blue Ribbon Group, is one of the most impressive undertakings that TSG has witnessed over the last 15 years of working in all 50 states. The plan typifies sound and responsible government. It is time for the Commonwealth to accept its responsibility to provide substantially increased funds for the DPA through a general fund appropriation.

## Chapter 1

**Introduction**

In 1972, the Kentucky Legislature established the Department of Public Advocacy (DPA), a statewide entity that oversees the delivery of indigent defense services in Kentucky's 120 counties. At its inception, the DPA was acknowledged by experts to be a model indigent defense program to be emulated across the nation by states grappling to provide the constitutionally protected right to counsel. Since those days, the DPA, faced with the constraints brought on by inadequate funding and burgeoning caseloads, has lost its preeminence in the field and is now working to reclaim its position at the forefront of quality indigent defense providers.

By statute, the state is responsible for funding indigent defense in Kentucky with the expectation that the counties would contribute local funds to augment the state appropriation. The Department of Public Advocacy meets its mandate to provide statewide administration of the appointment of counsel at trial in one of three ways:

1. Through staffed regional trial offices. As of May 1999, DPA had 21 regional public defender trial offices serving 71 of Kentucky's 120 counties.
2. Through one-year contracts between DPA and private attorneys in 47 of Kentucky's 120 counties.
3. In the urban counties of Jefferson (Louisville) and Fayette (Lexington) through yearly contracts between DPA and non-profit county public defender offices. Unlike most of the rest of the state, the two counties provide substantial funds to supplement state funds for the two offices.

The Department of Public Advocacy has four divisions, three of which have defender responsibilities:

1. The Law Operations Division (LOPS) provides administrative support for the statewide system. These duties include providing caseload data and analysis, fiscal information, technology, recruitment, personnel, payroll, education, grant oversight and development and criminal justice issues.
2. The Trial Division provides professional legal services to indigent defendants charged with criminal offenses or juvenile delinquency and status offenses in each county in the state at the trial level in circuit and district courts. It has six regional branches and a Capital Trial Branch.

3. The Post-Trial Division includes five branches: the Post-Conviction Branch which represents felons incarcerated in Kentucky prisons who are challenging some aspect of their conviction; the Appellate Branch, which represents persons on their initial appeal to Kentucky Appellate Courts; the Capital Appeals Branch, which represents persons on Kentucky's Death Row on their initial appeal; the Capital Post-Conviction Branch, which represents persons on death penalty post-conviction reviews; and, the Juvenile Post-Dispositional Branch, which represents juveniles on appeal or those who are contesting the fact, duration or conditions of their confinement in residential treatment facilities.
4. The Protection and Advocacy Division is a federally funded independent division within DPA which protects and promotes the rights of Kentuckians with disabilities through legally based individual and systemic advocacy and education. This Division has not been a focus of the Blue Ribbon Group's review.

There is also an Office of the Public Advocate which consists of the Public Advocate, Deputy Public Advocate, and General Counsel.

The Department is assisted in its work by the Public Advocacy Commission, a twelve person body consisting of representatives from each of the three law schools, and members appointed by the Kentucky Supreme Court and the Governor. The Commission recommends candidates for the position of Public Advocate to the Governor, assists the Department in ensuring independence through public education about the purpose of the public advocacy system, adopts the annual budget for the Department, and provides general supervision of the Public Advocate.

Several efforts have been taken by DPA over the years to attempt to address its chronic under-funding problem. In the summer of 1991, DPA contacted the American Bar Association seeking the assistance of The Spangenberg Group to conduct a performance evaluation of the statewide public defender system. The Spangenberg Group is a nationally recognized criminal justice research and consulting firm specializing in the delivery of indigent defense services. Created in July 1985 and located in West Newton, Massachusetts, The Spangenberg Group has conducted research and provided technical assistance to justice organizations in every state in the nation. Since its inception, The Spangenberg Group has been under contract with the American Bar Association's Bar Information Program (BIP), which provides support and technical assistance to individuals and organizations working to improve their jurisdictions' indigent defense systems. As the ABA's primary provider of technical assistance relating to indigent defense systems, The Spangenberg Group has worked with judges, bar associations, state and local governments, legislative bodies and public defender organizations throughout the country. Robert Spangenberg

spent considerable time in 1991 visiting Kentucky under the auspices of BIP, and subsequently wrote a report which raised most of the major issues that still face DPA in 1999.

In 1993, the Governor of Kentucky created the Task Force on the Delivery and Funding of Quality Public Defender Services. Mr. Spangenberg was asked to work with that group and testified before the Task Force. Not surprisingly, the resulting Task Force Report highlighted many of the same problems Mr. Spangenberg identified during his previous trips. The efforts of the Task Force resulted in new legislation that provided DPA with the new alternative funding sources, a \$52.50 DUI fee and a \$40.00 administrative fee.

In the fall of 1997, Mr. Lewis contacted The Spangenberg Group once again to seek assistance in reviewing the operation of DPA and the budget plans Mr. Lewis had for the future. Mr. Spangenberg and his colleague Michael Schneider came to Kentucky in late 1997 to do another assessment of the system statewide and to review DPA's plan for 1998-2000. This work concluded with yet another report by The Spangenberg Group repeating many of the problems that had by then become chronic and systemic.

One of the suggestions that The Spangenberg Group made which was enthusiastically shared by Mr. Lewis was the creation of a statewide blue ribbon commission in Kentucky to develop a plan for the 2000-2002 biennium. Mr. Spangenberg's suggestion was that the time for study was over and the time for action had arrived. This view was based upon years of study in Kentucky that actually began in the winter of 1980 when Mr. Spangenberg, while at Abt Associates, performed an evaluation of "The Southeastern Kentucky Public Advocacy Regional Project."

Mr. Lewis and his staff picked up the ball in late 1998 and began to create what is now the "Kentucky Blue Ribbon Group on Improving Indigent Defense in the 21<sup>st</sup> Century." The Blue Ribbon Group consists of more than 20 distinguished members representing all the branches of government, the bar and the community. (Membership of the group appears in *Appendix A* of this report). The Blue Ribbon Group has adopted the following mission statement:

***To address the chronic problems of the Kentucky public defender system and propose solutions in light of national information and standards, in order to create a strategy for ensuring an appropriately funded indigent defense system for the 21<sup>st</sup> century.***

To assist the Group in its mission, the DPA contracted with The Spangenberg Group to assist the members by providing detailed information from other states regarding many of the issues. During the past 15 years, The Spangenberg Group has worked with task forces and commissions in more than half of the states in the country. The Spangenberg Group has been retained on this project through a federal Edward G. Byrne Memorial grant awarded by the Kentucky Justice Cabinet.

The Blue Ribbon Group met on three occasions. The first meeting was held in Frankfort at the Kentucky Bar Association Headquarters on March 5, 1999. The second meeting was held in the same place on April 23, 1999, at which time the Blue Ribbon Group voted on a number of recommendations. The final meeting was held on May 25, 1999, and the Group endorsed this report and the recommendations contained in Chapter 5.

## Chapter 2

**Overview: The State of Indigent Defense in Kentucky**

To understand the state of indigent defense in Kentucky and the needs of the Department of Public Advocacy, it is important to place the DPA within the national framework of the delivery of public defender services throughout the country. Kentucky has had a long history of guaranteeing counsel to those unable to afford it,<sup>2</sup> and, since its creation in 1972, the Department of Public Advocacy has been continually recognized as a statewide public defender program with strong leadership and a number of important figures known to the national public defender community. In its infancy, the Department of Public Advocacy was seen as one of the better statewide public defender systems in the country. Unfortunately, that perception is no longer wholly accurate today and the failure of the DPA to live up to its ideal is the result of a long history of under-funding.

Despite the best efforts of past and present Public Advocates and Public Advocacy Commission leadership, the Department of Public Advocacy has never been a fully-funded state public defender system. The original legislation creating the DPA contemplated that when the state took over the funding for public defense in Kentucky, most counties would continue to contribute and supplement the state funds made available for their counties. Not surprisingly, like many other states in the country that have shifted from state to county funding, no counties in Kentucky have provided substantial county funds to support the public advocacy program (with the exception of

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<sup>2</sup> As early as 1948, in *Gholson v. Commonwealth*, 212 S.W.2d 537 (Ky. 1948), in a decision predating *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Kentucky Supreme Court held that “common justice demands” that all persons charged with felonies, including those too poor to hire their own lawyers, are entitled to counsel. Twenty-four years later in *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972), the Kentucky Supreme Court once again broke new ground, striking down as unconstitutional the widespread practice by state trial courts of compelling private attorneys to represent indigent defendants without compensation. In the wake of *Bradshaw*, the Kentucky Legislature overwhelmingly passed legislation, now codified as KRS Chapter 31, establishing the Office of the Public Defender- subsequently renamed the Department of Public Advocacy- and charging it with the responsibility of representing all persons in Kentucky charged with a “serious crime”.

Above and beyond the requirements imposed by Section 11 of the Kentucky Constitution, and by the Sixth and Fourteenth Amendments to the United States Constitution, KRS Chapter 31 seeks to make good on the promise of *Gholson* by ensuring that all indigent persons in Kentucky charged with or detained for “a serious crime” have the right to appointed counsel “to the same extent as a person having his own counsel is so entitled.” KRS Chapter 31 defines “serious crimes” to include felonies, misdemeanors or offenses where the defendant faces the possibility of either confinement or a fine of not less than \$500. KRS 31.110(1)(a). KRS Chapter 31 further guarantees the right to appointed counsel in at least two other situations: 1) to juveniles facing delinquency petitions stemming from conduct that, “but for the age of the [child], would otherwise be a serious crime” and juveniles accused of certain status offenses; and 2) to individuals in “[a]ny legal action which could result in the detainment of a defendant,” including involuntary civil commitments under KRS Chapter 202A of the state’s mental health laws, and civil contempt proceedings as discussed in *Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993). KRS 31.110(4)(a)-(d). The DPA also handles appellate and post-conviction cases.

Boyd, Jefferson and Fayette Counties). This is obviously due in large part to the fact that the legislation creating the state funded program did not mandate (except for Jefferson County) the counties to contribute after 1972.

For some time, Kentucky has relied extensively on alternative revenue sources to supplement state funding of various agencies and now assesses over 50 different fees against people passing through the state's justice system. Upon the recommendation of the 1993 Governor's Task Force on the Delivery and Funding of Quality Public Defender Services, any indigent person who is assigned a public defender or court-appointed counsel in a criminal case is now assessed a \$52.50 administrative fee unless they are unable to afford it. Revenue collected from this fee is placed in a special trust and agency account for use by the DPA. In FY 1998, the DPA received \$691,651 from this alternative revenue source.

The DPA also receives 25% of the \$200 service fee assessed against individuals convicted of drunk driving. Additionally, Kentucky requires each county to appropriate 12.5 cents per capita of the county population to a fund established to cover expert witness fees and other comparable expenses associated with providing indigent defense services. Kentucky courts also assess recoupment charges against indigent defendants. While revenue from the administrative and DUI fees are returned to the DPA, recoupment collections are returned to the county indigent defense system (defender or contract) in which the recoupment was ordered.

Kentucky is among the most successful of all the states in the collection of alternative sources of revenue. Kentucky collects more revenue from defendants than any other state. Kentucky collects more on the administrative fee per capita than any other state.

Unfortunately, the supplemental monies available from the alternative revenue sources have not solved the funding needs of the DPA. Additionally, alternative revenue sources can never be adequately budgeted for. The result is that indigent defense in Kentucky remains in a crisis. Kentucky now ranks among the worst in the nation in the following three public defender services key indicators: indigent cost-per-capita; indigent defense cost-per-case; and, public defender salaries. DPA employees are underpaid compared to Commonwealth Attorneys, and the low salaries have led to high turnover rates. The DPA continues to experience the effects of chronic under-funding. The expenditure history of the DPA since 1981 is detailed on Table 2.1.

<b>Department of Public Advocacy Expenditure History</b> (Without Protection & Advocacy Division)									
<u>Fiscal Year</u>	<u>General Funds</u>	<u>% Change</u>	<u>Agency Funds</u>	<u>% Change</u>	<u>Federal Funds</u>	<u>% Change</u>	<u>Fiscal Court Contributions</u>	<u>Total Funds</u>	<u>% Change</u>
1981	\$ 3,802,500	0.00%	\$49,700	0.00%	\$862,900	0.00%		\$4,715,100	0.00%
1982	\$4,944,800	30.04%	\$55,000	10.66%	\$46,300	-94.63%		\$5,046,100	7.02%
1983	\$ 5,581,800	12.88%	\$100,400	82.55%	0	-100.00%		\$5,682,200	12.61%
1984	\$6,168,800	10.52%	\$75,600	-24.70%	0	0.00%		\$6,244,400	9.89%
1985	\$6,225,000	0.91%	\$148,400	96.30%	0	0.00%		\$6,373,400	2.07%
1986	\$6,524,300	4.81%	\$141,900	-4.38%	0	0.00%		\$6,666,200	4.59%
1987	\$7,163,700	9.80%	\$200,500	41.30%	0	0.00%		\$7,364,200	10.47%
1988	\$8,015,500	11.89%	\$220,300	9.88%	0	0.00%		\$8,235,800	11.84%
1989	\$8,294,500	3.48%	\$291,700	32.41%	\$21,600	0.00%		\$8,607,800	4.52%
1990	\$8,601,700	3.70%	\$393,500	34.90%	\$192,600	791.67%		\$9,187,800	6.74%
1991	\$ 9,925,700	15.39%	\$368,600	-6.33%	\$219,500	13.97%		\$10,513,800	14.43%
1992	\$9,973,000	0.48%	\$618,600	67.82%	\$411,800	87.61%		\$11,003,400	4.66%
1993	\$10,006,800	0.34%	\$509,000	-17.72%	\$362,800	-11.90%	\$1,265,300	\$12,143,900	10.36%
1994	\$10,212,100	2.05%	\$594,200	16.74%	\$372,000	2.54%	\$1,294,700	\$12,473,000	2.71%
1995	\$11,777,800	15.33%	\$683,000	14.94%	\$402,400	8.17%	\$1,259,200	\$14,122,400	13.22%
1996	\$12,229,900	3.84%	\$1,852,800	171.27%	\$235,100	-41.58%	\$1,383,200	\$15,701,000	11.18%
1997	\$12,871,600	5.25%	\$2,970,900	60.35%	\$45,400	-80.69%	\$1,447,200	\$17,335,100	10.41%
1998	\$13,256,600	2.99%	\$3,975,000	33.80%	\$72,100	58.81%	\$1,358,700	\$18,662,400	7.66%
1999 <sup>1</sup>	\$16,234,200	22.46%	\$3,481,200	-12.42%	\$165,600	129.68%	\$1,679,300	\$21,560,300	15.53%
2000 <sup>1</sup>	\$16,767,100	3.28%	\$3,815,600	9.61%	\$1,066,600	544.08%	To Be Determined	\$21,649,300	

This table sets out total expenditures for DPA except those for the Protection and Advocacy Division from FY 1981-1998. Figures for FY 1999 and FY 2000 are projected expenditures. The increase from FY 1991-1998 for general fund and agency funds totaled \$6,937,300. Of this increase, \$3,606,400 was from increased revenue. During that seven year period, the increase of general funds was less than \$480,000 per year.

The rest of this report details methodology, our findings and recommendations.



## Chapter 3

**Methodology: Indigent Defense State-By-State Comparisons**

When assessing the state of an indigent defense program, The Spangenberg Group looks to similar indigent defense systems across the country with which to compare the program. Making comparisons between various indigent defense systems is an imperfect science, due to a wide number of variables. Among the most important variables to consider in state-by-state indigent defense comparisons are the following:

- Whether the system is funded entirely with state funds, entirely with county funds, or a mixture of both.
- Whether the system is organized at the county, regional, or state level.
- Whether or not the state has the death penalty.
- Whether the system has a centralized organization responsible for statewide data collection, oversight, and/or policy making.
- The types and percentages of cases handled by various providers in the state. For example, does a specific program handle appeals or death penalty cases? What percentage of the total indigent defense caseload is made up of less time consuming cases such as misdemeanor or traffic cases?
- The rate of pay for court-appointed counsel in the state.
- The population of the state.
- The way in which programs define, and therefore count, cases. Different programs define cases by charge, by indictment, by defendant, by assignment and by disposition.
- The availability of complete, up-to-date and reliable data.

In an attempt to compare expenditures, caseloads and systems in states similar to Kentucky we have used the following criteria:

- States in proximity to Kentucky;
- States with state funded systems;
- States with public defender programs organized and administered at the statewide level;
- States with regional public defender offices;
- States that have the death penalty; and/or,
- States that collect reliable data at the statewide level.

The states that we chose as surrounding states<sup>3</sup> are: Indiana, Missouri, Ohio, Tennessee, Virginia and West Virginia (no death penalty). States that meet the other criteria are: Colorado, Connecticut, Delaware, Florida, Iowa (no death penalty), Kansas, Massachusetts (no death penalty), Minnesota (no death penalty), New Jersey, New Mexico, North Carolina (no statewide organization), Oklahoma and Wisconsin (no death penalty). A brief discussion on how each of these states provide indigent defense services appears in *Appendix B* of this report.

Once the sample states were identified, The Spangenberg Group conducted telephone interviews with representatives of state public defender programs, Administrative Offices of the Courts, and statewide indigent defense commissions in each state chosen. Those interviewed were asked to provide: the total statewide number of indigent defense cases handled in fiscal year 1998; a breakdown of the statewide indigent defense caseload by felony, misdemeanor, juvenile delinquency cases, juvenile dependency cases, appeals, capital and post-conviction cases and other cases; the total statewide expenditure for indigent defense including public defender programs, court-appointed counsel and contract defenders in fiscal year 1998; the portion of the indigent defense expenditure provided by the state; the indigent defense expenditure provided by counties; and, the total amount of money generated for indigent defense programs through additional, non-general fund revenue sources in fiscal year 1998. In some instances, complete FY 98 data was not yet available; when this occurred FY 97 data was obtained instead.

The results of our comparison surveys are discussed at length in the following chapter.

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<sup>3</sup> Illinois trial-level indigent defense services are county-funded and centralized data is not available. Thus, we excluded Illinois from this study.

## Chapter 4

**Findings**

All too frequently, when reports are written or studies prepared on government agencies, the findings are simply a laundry list of all the things that are wrong with the program. This set of findings will begin by highlighting the many positive attributes of the Department of Public Advocacy as viewed by The Spangenberg Group in May 1999.

The following is a list of the major findings that the Blue Ribbon Group addressed in preparing a series of recommendations for “Improving Indigent Defense for the 21<sup>st</sup> Century” in Kentucky.

**Finding #1: The Department of Public Advocacy is a Solid, Efficient, and Well-Managed Program.**

Over the past year, and particularly over the past several months during the life of the Blue Ribbon Group, The Spangenberg Group has had a unique opportunity to observe and work with the Public Advocate and his top administration. First and foremost, the DPA has recognized the importance of maintaining healthy and positive relationships with all three branches of government and has worked cooperatively with each agency in Kentucky’s criminal justice system. This has occurred with a clear understanding of the agency’s primary responsibility to the clients they represent following court appointment.

Furthermore, we believe that this administration has a sense of the urgency of managing the agency’s funds on behalf of the public in an efficient and professional manner.

Among the many examples that illustrate this are the following:

- The Public Advocate has regionalized the delivery of trial services across the state;
- A substantial improvement has been made in education with the addition of an assistant trainer who focuses on juvenile litigation and education of full-time and contract staff;
- Increased emphasis on active coaching of staff to improve representation of clients, through case reviews, performance agreements, regular coaching, twice per year evaluations, quarterly leadership education for supervisors and future leaders;

- The DPA has, as in years past, been highly successful in the securing of federal funds, particularly Byrne grants;
- Serious attempts have been made by management to urge the increased collection of additional revenue through letters, telephone calls and visits to staff and judges;
- A substantially improved computerized management information and case-tracking system are now in place; and,
- The Public Advocate and the Deputy Public Advocate have spent hundreds of hours on the road visiting with key leaders in government and the criminal justice system, explaining in a clear and responsive way the needs of the agency.

**Finding #2: The Department of Public Advocacy Has Implemented an Impressive Plan for the 1998-2000 Biennium.**

The success of the DPA in convincing the Governor and legislature to increase the budget of the agency by some \$4.6 million for the current biennium is impressive. It is impressive not only for its accomplishments, but also for the design and priorities set out in the original budget request and for the speedy implementation of the various aspects of the plan in a timely manner. Improving management and efficiency is a hallmark of this administration and will, we believe, continue to exist whatever the result of the next biennium appropriation will be.

**Finding #3: The Department of Public Advocacy is Effective in Indigent Defense Cost Recovery Compared to Other States.**

The term “cost recovery” can be confusing since it may, in fact, have several meanings. For example, “cost recovery” in some jurisdictions around the country may include all of the following:

- An up-front administrative fee or cost that criminal defendants are asked to “contribute” during the screening process. These fees may range from as little as \$5 to as much as \$200;
- A promissory note signed by a defendant or the parent/guardian of juvenile defendants before sentencing; and,
- A court-ordered cost imposed at the time of sentencing called “recoupment.” This assessment is an effort to recover all or a portion of the cost of court-appointed counsel.

Generally speaking, up-front administrative fees and payments on promissory notes are collected prior to sentencing. In some jurisdictions, if a balance remains on the promissory note at the time of sentencing, it may become part of the recoupment order.

In our experience, there are several factors that affect cost recovery collection rates in jurisdictions around the country:

- The poverty rate;
- The number of defendants released pre-trial on bail versus the number held in jail;
- The percentage of urban versus rural areas;
- The number of other court costs and fees assessed on the defendant;
- The position of judges, clerks, defenders, prosecutors, and parole officers toward cost recovery; and,
- The number of additional court appearances which reduce the cost and efficiency of the collection efforts.

As stated earlier, any indigent person in Kentucky who is assigned a public defender or court-appointed counsel in a criminal case is assessed a \$52.50 administrative fee with \$2.50 going to Court Clerks. In FY 1998 the administration fee was \$40. That year, the DPA recovered \$691,651 through the administration fee. This meant that 3.6% of the indigent defense expenditure was derived from this alternative revenue source. Additionally, the DPA receives 25% of the \$200 service fee assessed against individuals convicted of drunk driving, and, that same year, \$1,120,711 was collected through the DUI fund. Finally, the courts also assess recoupment charges against indigent defendants. Recoupment collections are returned to the county in which the recoupment was ordered. Kentucky counties collected \$995,582 through recoupment. In total, 14.7% of Kentucky's indigent defense costs were recovered in FY 1998 through non-general fund revenue. At almost 15% of the total DPA budget, Kentucky's public defender program is more dependent on alternative revenue than any other state public defender program.

Of the twelve sample states that collect an administrative fee, eight were able to give us a figure for the total amount of revenue collected (Colorado, Connecticut, Florida, New Jersey, New Mexico, Oklahoma, South Carolina, Tennessee). Only one of the nine (Florida: \$1,100,000) collected more than Kentucky. Florida has a population that is over three times larger than Kentucky. Additionally, Kentucky's poverty rate (17.9%) is higher than Florida's.

Table 4.1  
**Comparison of Administration Fee Collections**

State	Poverty Rate (1996)	FY 1998 Funding	FY 1998 Administrative Fee			
			Fee	Revenue	Revenue Recipient	% of Funds from Fee
KY	17.9%	\$19,023,723 <sup>4</sup>	\$40	\$691,651	DPA	3.6%
FL	15.2%	\$123,593,616	\$40	\$1,100,000	Indigent Defense Fund	0.9%
TN	14.7%	\$35,817,993	\$50	\$600,000	General Fund	1.7%
<sup>5</sup> NJ	8.7%	\$57,295,000	\$50	\$211,555	State Public Defender	0.4%
CO	10.4%	\$29,289,326	\$25	\$208,500	General Fund	0.7%
SC	15.7%	\$13,948,430	\$25	\$150,203	Office of Indigent Defense	1.1%
<sup>6</sup> NM	20.2%	\$17,956,300	\$10	\$114,683	Public Defender Automation Fund	0.0%
<sup>7</sup> CT	8.3%	\$23,096,382	\$25	\$87,885	State Public Defender	0.4%
OK	18.2%	\$19,226,832	\$40	\$40,000	Public Defender & Courts	0.2%

Kentucky has the highest administrative fee collection rate per capita of any of these states (\$0.18). The only other state that has a collection per capita cost over \$0.10 is Tennessee (\$0.11). Five states collect \$0.05 per capita or less through their administrative fee programs (Colorado, Connecticut, New Jersey, Oklahoma, and South Carolina).

Table 4.2

<sup>4</sup>The FY 1998 funding figure for Kentucky includes expenditures of DPA as well as expert funds available for private court appointed counsel, but not administered by DPA. This figure was used in order to compare, in a reliable way, total indigent defense expenditures in other states that appear in this report.

<sup>5</sup>1997 figures. 1998 figures unavailable.

<sup>6</sup>1997 figures. 1998 figures unavailable.

<sup>7</sup>Connecticut's FY1998 funding figure on this chart represents the expenditure for the State Public Defender only and does not include expenditure data for the state's assigned counsel program. All revenue from CT's \$25 fee returns to the state public defender and thus we felt it is more appropriate to use the public defender expenditure only for this chart. In 1998, Connecticut spent approximately \$10 million on assigned counsel statewide. Future charts in this report include the assigned counsel expenditure data.

<b>Administration Fee Collections Per Capita, FY 1998</b>			
<u>State</u>	<u>Population</u>	<u>Administration Fee Revenue</u>	<u>Collection Per Capita</u>
KY	3,833,723	\$691,651	\$0.18
TN	5,319,654	\$600,000	\$0.11
FL	14,339,723	\$1,100,000	\$0.08
NM	1,713,407	\$114,683	\$0.07
CO	3,822,676	\$208,500	\$0.05
SC	3,698,746	\$150,203	\$0.04
NJ	7,987,933	\$211,555	\$0.03
CT	3,274,238	\$87,885	\$0.03
OK	3,300,902	\$40,000	\$0.01

Discussions at one of the Blue Ribbon Group meetings suggested that one answer to the under-funding of the Department might be to try to increase the percentage of defendants who contribute, either through the administrative fee, the DUI fund or recoupment. It is our strong belief that these revenue funds are virtually tapped out. In fact, there are over 50 legislative requirements for court fees, costs, restitution, fines, etc., having to do with criminal and civil cases. In many cases, indigent defendants are ordered to pay several of these costs, some of which are mandated by statute.

In looking at alternative revenue collected in various states for the use of public defense, one figure is seldom calculated and that is the cost of the revenue collection. Few, if any states have attempted to calculate whether the net revenue brought in by these programs wind up as a profit or a loss. Based upon work that we have done in the area of alternative revenue, it is our belief that it would not be wise to attempt to collect from additional defendants to raise the alternative revenue source because the cost to do that would likely exceed the actual revenue brought in.

Perhaps more importantly, Kentucky is already at the top of the list of comparable states when it comes to alternative revenue collections. With 15% of its funds from alternative revenue, Kentucky is in the top two states regarding collection rates for all types of alternative revenue

sources. Only South Carolina (44.7%) ranks higher.<sup>8</sup> South Carolina has a lower poverty rate than Kentucky (15.7%, as compared to 17.9%), and relies upon alternative revenue as its primary source of indigent defense funding.

When assessing percentage of funds which come solely from an administrative fee, Kentucky ranks first, with 3.7% of its budget derived from its fee. No other state even comes close to this rate; Tennessee is next with 1.7%. The Kentucky administrative fee also brings in more revenue per capita (\$0.18) than do any other states with such fees.

Of course, all of this good news is tempered by the fact that, despite the tremendous work of the DPA administration, we believe that further major efficiencies are not possible without substantial additional funding. The rest of our findings detail the strain imposed on the agency through under funding. Public defense in Kentucky, when measured by per capita expenditures, cost-per-case, average caseloads per full-time equivalent attorney, public defender salaries and other measures, has been slipping down the ladder for over a decade compared to other similar states.

**Finding #4: The Department of Public Advocacy Ranks at, or Near, the Bottom of Public Defender Agencies Nationwide in Indigent Defense Cost-Per-Capita & Cost-Per-Case.**

Table 4.3 compares the indigent defense cost-per-capita for FY 1998 and FY 1997. Of the 14 states surveyed who provided FY 1997 information, Kentucky ranked ninth in population size of the sample group, yet second to last in total dollars spent on indigent defense. As a result, Kentucky ranked last in indigent defense cost-per-capita (\$4.28). The one state that spent less than Kentucky on indigent defense in FY 1997 (Delaware: \$6.624 million), spent more than twice as much per capita on indigent defense. The two states closest in population size to Kentucky (Colorado: 3.822 million, and Minnesota: 4.657 million), respectively expended 59% and 147% more on indigent defense than Kentucky (Colorado: \$26.4 million; and Minnesota: \$41 million). Colorado spent \$2.64 more per capita on indigent defense (\$6.92), while Minnesota spent more than twice as much per capita as Kentucky in FY 1997 (\$8.80). All of Kentucky's neighboring

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<sup>8</sup> In South Carolina, legislation has added a surcharge on all fines in criminal cases in General Sessions, Magistrate and Municipal Courts, of which a certain percentage is mandated for public defense. This is why the percentage of revenue funds for indigent defense is so high in that state.

states that provided us with FY 1997 data spent more per capita than Kentucky, and one neighboring state (West Virginia: \$11.17) outspent Kentucky by more than 160% on indigent defense.

In FY 1998, Kentucky increased its indigent defense expenditure by over 14.4%, up to \$19.023 million. This raised the state's indigent defense cost-per-capita to \$4.90. Despite the increase, Kentucky again ranked near the bottom of indigent defense spending (11 of 13) out of the states that were able to provide us with complete FY 1998 expenditure figures. Only one state, Missouri<sup>9</sup> (\$4.61) spent less per capita on public defender services than Kentucky. The only other neighboring state in the sample (Tennessee) spent \$1.83 more per capita on indigent defense than Kentucky in FY 1998.

Table 4.3  
Indigent Defense Cost-Per-Capita

FY 1997				FY 1998			
State	Population (1996)	Expenditure	Cost-Per-Capita	State	Population (1996)	Expenditure	Cost-Per-Capita
KY*	3,883,723	\$16,627,327	\$4.28	KY*	3,883,723	\$19,023,608	\$4.90
WV	1,825,754	\$20,400,000	\$11.17	WI	5,159,795	\$62,601,951	\$12.13
NM*	1,713,407	\$17,956,300	\$10.48	IA	2,851,792	\$29,373,684	\$10.30
MA	6,092,352	\$63,555,000	\$10.43	CT*	3,274,238	\$33,096,382	\$10.11
DE*	724,842	\$6,624,920	\$9.14	DE*	724,842	\$7,047,920	\$9.72
MN	4,657,758	\$41,000,000	\$8.80	MN	4,657,758	\$45,108,000	\$9.68
NJ*	7,987,933	\$57,295,000	\$7.17	FL*	14,399,985	\$123,593,616	\$8.58
NC*	7,322,870	\$51,765,903	\$7.07	NC*	7,322,870	\$58,622,732	\$8.01
CO*	3,822,676	\$26,444,260	\$6.92	CO*	3,822,676	\$29,289,326	\$7.66
VA*	6,675,451	\$43,271,804	\$6.48	TN*	6,675,451	\$35,817,993	\$6.73
CT*	3,274,238	\$20,814,611	\$6.36	OK*	3,300,902	\$19,226,832	\$5.82
OH*	11,172,782	\$62,378,131	\$5.58	KS*	2,572,150	\$13,701,308	\$5.33
IN*	5,840,528	\$25,943,799	\$4.44	MO*	5,358,692	\$24,727,622	\$4.61
MO*	5,358,692	\$23,169,886	\$4.32	* = Death Penalty States			

Like its cost-per-capita figures, Kentucky's indigent defense cost-per-case also shows Kentucky lagging behind other states (See Table 4.4.). In FY 1997, Kentucky provided

<sup>9</sup>Missouri State Public Defender received a \$3.5 million increase in its FY 1999 state appropriation. This raises its cost-per-capita figure above Kentucky's FY 1998 figure.

representation in 103,209 indigent defense cases. Out of the fourteen sample states for which FY 1997 data was available, Kentucky ranked fifth in number of cases handled. Once again, Kentucky was second to last in total state dollars spent on indigent defense, thus ranking last in indigent defense cost-per-case (\$161.10). The only state that spent less on indigent defense (Delaware) had a caseload that was over 67.5% less than Kentucky's. Of the three neighboring states that provided us with FY 1997 data, two (West Virginia and Indiana) had both lower caseloads and higher indigent defense expenditures than Kentucky. Ohio had an indigent defense caseload (287,126) that was 178% higher than Kentucky, yet the state outspent Kentucky by \$56.15 per case. Ohio's indigent defense expenditure was more than three and a half times greater than Kentucky's in FY 1997.

In FY 1998, Kentucky's caseload decreased by approximately 1.9% (from 103,209 to 101,210). This, combined with the 14.4% increase in indigent defense spending that year (up from \$16.627 million to \$19.023 million), raised the state's indigent defense cost-per-case to \$187.96 (an increase of 16.67%). Still, Kentucky ranked last in cost-per-case for FY 1998. In fact, Kentucky's FY 1998 cost-per-case figure remains less than all of the FY 1997 states that reported these data. Missouri, the only state that spent less than Kentucky per capita in FY 1998, spent significantly more per indigent defense case (\$325.22 compared to Kentucky's \$187.96). The state that spent approximately the same amount as Kentucky on indigent defense in FY 1998 (Oklahoma: \$19.2 million) had a caseload that was 41.47% smaller than Kentucky's.

Table 4.4  
Indigent Defense Cost-Per-Case

FY 1997				FY 1998			
State	Total Cases	Expenditure	Cost-Per-Case	State	Total Cases	Expenditure	Cost-Per-Case
KY*	103,209	\$16,627,327	\$161.10	KY*	101,210	\$19,023,608	\$187.96
NJ*	88,343	\$57,295,000	\$648.55	KS*	24,876	\$13,701,308	\$550.78
CO*	65,387	\$26,444,260	\$404.43	WI	117,075	\$62,601,951	\$534.72
NC*	141,488	\$51,765,903	\$365.87	IA	62,102	\$29,373,684	\$472.99
MO*	71,172	\$23,169,886	\$325.55	CO*	69,635	\$29,289,326	\$420.61
WV	62,784	\$20,400,000	\$324.92	CT*	85,575	\$33,096,382	\$386.75
NM*	59,154	\$17,956,300	\$303.55	NC*	154,148	\$58,622,732	\$380.30
MA	210,120	\$63,555,000	\$302.47	MO*	76,034	\$24,727,622	\$325.22
IN*	91,886	\$25,943,799	\$282.35	OK*	59,241	\$19,226,832	\$324.55
CT*	86,505	\$20,814,611	\$240.62	MN	185,518	\$45,108,000	\$243.15
MN	177,534 <sup>10</sup>	\$41,000,000	\$230.94	TN*	151,827	\$35,817,993	\$235.91
OH*	287,126	\$62,378,131	\$217.25	DE*	35,329	\$7,047,920	\$199.49
DE*	33,506	\$6,624,920	\$197.72	<sup>11</sup> FL*	223,132	\$123,593,616	\$193.93
VA*	223,132	\$43,271,804	\$193.93	* = Death Penalty States			

Kentucky, by comparison with these other states, has an overwhelming number of cases to handle, in some part due to the statutory requirement giving the same rights to indigent defendants as to a person with his own counsel (see footnote 1). The impact of the law has its greatest effect on misdemeanor cases, where the percentage of adult misdemeanor cases compared to adult felony cases is almost the highest of any state in the country. Individual public defenders in Kentucky are still handling in excess of 600 cases per year in many areas of the state. These caseloads are higher than virtually any other state in the comparison group. Although the Department of Public Advocacy

<sup>10</sup> Minnesota's FY 1997 caseload totals were unavailable. Figure shown is FY 1996 caseloads.

<sup>11</sup> Florida's FY1998 data includes assigned counsel cases. Expenditure data for assigned counsel is unavailable. If

has an enormously high caseload for the reasons mentioned above, there are new required cases for which they are responsible but did not receive additional funding in the 1998 General Assembly. These include increased or new responsibilities in the following areas: pre-release probation; Megan's Law; alternative sentencing; juvenile supervised placement revocation hearings; and, methamphetamine cases.

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assigned counsel expenditure data was available, FL's cost-per-case would be higher.

Several states in our comparison group do not have the death penalty. If it were possible to calculate expenditures for DPA that did not include death penalty costs and compare that figure with the total expenditures in non-death penalty states, the difference in costs-per-case and costs-per-capita would be even greater.

The lack of funding and overwhelming caseload does not create a problem solely for indigent defendants who are entitled to competent counsel, but also affects the whole criminal justice system in Kentucky. The Department of Public Advocacy in recent years has worked very hard with other components of the criminal justice system to make the system more efficient and to improve methods of processing cases. The Department believes that all of the components of the criminal justice system should be adequately funded and seeks nothing more than balanced and adequate funding for the DPA in comparison to other Kentucky criminal justice agencies.

It is true that if cases cannot be moved consistently and efficiently through the criminal justice system to meet legislative requirements, because of the fact that there are not enough public defenders, then the legislature and the public will become frustrated. It is clear that if there were a sufficient number of public defenders with a reasonable caseload and appointments were made early in the process, it would benefit the entire system and the public. If, on the other hand, the caseload remains overwhelming and there are not enough public defenders or competent contract attorneys to handle the cases, inevitably cases will be reversed on appeal and require a second trial, which will cost substantial additional money for the Commonwealth.

**Finding #5: The Department of Public Advocacy Per Attorney Caseload Far Exceeds National Caseload Standards.**

As long as funding fails to keep pace with the growing caseloads, public defenders will continue to handle more cases than they should according to national standards. In response to the rising crime rate and changes in constitutional requirements throughout the criminal justice system in the last two decades, the American Bar Association (ABA) has taken a leadership role in developing a set of standards and goals for each component of the criminal justice system. These are found in the ABA's *Standards Relating to the Administration of Criminal Justice*. Two of its chapters address the subject of indigent defense. Chapter 4 is devoted to the prosecution and defense functions, and Chapter 5 concerns the provision of defense services.

Standard 4-1.3(e) of Chapter 4 deals with the ethical considerations of the defense lawyer.

It states:

Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations...<sup>12</sup>

Chapter 5 provides a blueprint and set of standards for delivering defense services. It spells out in detail the requirements for both public defenders, contractors, and privately appointed counsel in meeting their constitutional and ethical requirements. Standard 5-5.3 provides:

- (a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.
- (b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgement, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including

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<sup>12</sup> American Bar Association Standards for Criminal Justice Prosecution Function and Defense Function, Standard 4-1.3 Delays; Punctuality; Workload, p. 126 (1993).

the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.<sup>13</sup>

While these statements, guidelines, and standards are extremely important, they do not provide specific guidance as to what constitutes an excessive workload or what lawyers should do when they have reached the workload limit. The only national source that has attempted to quantify a maximum annual public defender caseload is the National Advisory Commission (NAC), which published its standards in 1973. In that report, Standard 13.12 on "Workload of Public Defenders" states:

The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.<sup>14</sup>

Commentary to Standard 5-5.3 of the ABA Standards references the public defender caseload standards developed by NAC, noting they "have proven resilient over time, and provide a rough measure of caseloads."<sup>15</sup>

While the NAC standards do not make specific recommendations for public defenders who, like those with the DPA, handle mixed caseloads, it is clear that the DPA numbers far exceed those contemplated by the NAC. In FY 1998, attorneys in Louisville handled an average of 700 cases, while defenders in Lexington maintained an average annual caseload of 545. The Spangenberg Group's on-site 1997 interviews revealed that virtually all attorneys contacted felt that their caseloads were too heavy, the quality of representation they provided was adversely affected by the size of their caseloads, and that they simply did not have enough time to interview all clients, investigate cases, prepare for trial and draft motions, memoranda, and briefs adequately. This feeling was corroborated by our interviews with judges.

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<sup>13</sup>American Bar Association Standards for Criminal Justice Providing Defense Services, Third Edition, Standard 5-5.3. Workload, p. 67 (1992).

<sup>14</sup>National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Courts* (Washington, D.C., 1973), p. 186. These standards did not include capital cases.

<sup>15</sup>American Bar Association Standards for Criminal Justice Providing Defense Services, Third Edition, p. 72.

Reducing the caseloads, therefore, is a step which must be taken in order to ensure that defenders in Kentucky have the time and resources available to do their jobs. Increasing the public

defender system funding will enable the DPA to support more attorneys, thus spreading the cases more equitably among the defenders. The DPA has set target caseloads of 450 open cases per year per attorney in urban areas, and 350 open cases per year per attorney in rural areas.

**Finding #6: The Department of Public Advocacy Ranks At, or Near, the Bottom of Public Defender Salaries Nationwide for Attorneys at All Experience Levels.**

The Spangenberg Group compared public defender salaries in each of Kentucky's neighboring states. In Illinois, public defender salaries were obtained from several different county public defender programs. Missouri, Tennessee, and West Virginia all have statewide public defender systems in which public defenders adhere to a statewide pay plan. Public defender salaries vary by county or region in Ohio, Indiana, and Virginia. We have tried to present a sample of salaries for these states. For Ohio, we used the salary established by the state Public Defender Commission. Indiana's salary figures represent the amounts paid to attorneys with the State Public Defender, an office handling state post-conviction and some direct appeal cases.

We also gathered salary data from selected states with systems similar to Kentucky's, such as Colorado, Delaware, Iowa, Kansas, Minnesota, New Mexico, Oklahoma, Tennessee and Wisconsin. All of these states have a statewide public defender organization with a pay plan which applies to most, if not all, public defenders in the state.

Tables 4.5 through 4.8 present salary information by experience level. Table 4.5 depicts the salary for entry level attorneys. The minimum salary for new public defenders in Kentucky, \$23,388, is the lowest of all the states. The average entry-level salary in the 23 comparison jurisdictions is \$32,396, almost \$10,000 higher than the salary in Kentucky. Illinois, the only state in the sample that has county-funded indigent defense trial level representation, on average starts entry-level attorneys off at a salary that is \$10,473 above what new Kentucky public defenders earn. In fact, five of Kentucky's seven neighboring states start public defenders off with a salary above \$30,000 per year (Illinois, Indiana, Ohio, Virginia and West Virginia).

Table 4.5		
<b>Comparison of Public Defender Salaries: Entry-Level</b>		
<u>State</u>	<u>Agency</u>	<u>Entry-Level Salary</u>
Kentucky	Department of Public Advocacy	\$23,388
Colorado	State Public Defender	\$34,188
Delaware	State Public Defender	\$37,000 (avg. pay)
Illinois	Cook County Public Defender	\$35,828
	DeKalb County Public Defender	\$32,468
	DuPage County Public Defender	\$35,869
	McLean County Public Defender	\$28,000
	Rock Island County Public Defender	\$38,000
	Will County Public Defender	\$33,000
	State Appellate Public Defender	\$32,250
Indiana	State Public Defender	\$32,578
Iowa	State Public Defender	\$34,132
Kansas	Board of Indigent Defense Services	\$30,810
Minnesota	Board of Public Defense	\$33,777
Missouri	State Public Defender	\$27,504
New Mexico	State Public Defender Department	\$27,695
Ohio	Public Defender Commission	\$35,818
Oklahoma	Indigent Defense Services	\$26,542
Tennessee	District Public Defender Conference	\$28,416
Virginia	Public Defender Commission (Northern Virginia)	\$39,839
	Public Defender Commission (Except Northern Virginia)	\$36,032
West Virginia	Public Defender Services	\$30,000
Wisconsin	State Public Defender	\$31,971

As attorneys build tenure within a public defender organization, it is expected that their salary levels will reflect their growing experience levels. A DPA attorney with five years of experience can currently expect to make \$39,289 per year. In 41.67% of the other jurisdictions surveyed (5 of 12), public defenders with five years of experience average over \$50,000 per year. In half of the other states (5 of 10), attorneys may make over \$60,000 per year with five years of experience. In Minnesota, public defenders with only three years of experience are paid approximately \$49,895 (in a range of \$41,095 - \$58,694). Only one state in the sample (Kansas: \$38,012) pays its public defenders with five years of experience less than Kentucky.

Table 4.6 <b>Comparison of Public Defender Salaries: Senior Non-Supervisory Level<sup>16</sup></b>				
<b><u>State</u></b>	<b><u>Agency</u></b>	<b><u>Experience</u></b>	<b><u>Salary Range</u></b>	<b><u>Midpoint</u></b>
Kentucky	Department of Public Advocacy	5 Years	\$38,833 - \$39,744	\$39,289
Delaware	State Public Defender	No set definition	\$47,000 - \$56,000	\$51,500
Illinois	DuPage County Public Defender	No set definition	\$43,704 - \$65,554	\$54,629
	Rock Island County Public Defender	No set definition	\$45,000 - \$65,554	\$55,277
	State Appellate Public Defender	5 Years	\$39,750	\$39,750
Iowa	State Public Defender	2-5 Years	\$42,744 - \$54,588	\$48,666
Kansas	Board of Indigent Defense Services	5 Years	\$38,012	\$38,012
Minnesota	Board of Public Defense	3 Years	\$41,095 - \$58,694	\$49,895
Missouri	State Public Defender	4 Years	\$43,704	\$43,704
New Mexico	State Public Defender Department	4 or more years	\$45,614 - \$68,424	\$57,019
Ohio	Public Defender Commission	No set definition	\$43,472 - \$65,582	\$54,527
Tennessee	District Public Defender Conference	5 Years	\$42,264	\$42,264
Virginia	Public Defender Commission (Northern Virginia)	4 or more years	\$43,059 - \$67,227	\$55,143
	Public Defender Commission (Except Northern Virginia)	4 or more years	\$47,072 - \$73,941	\$60,507

<sup>16</sup> Job classifications are defined differently by each agency. For purposes of this table, we identified the job classification that would include a senior attorney with approximately five years experience with the agency and no experience outside of the agency.

Kentucky again ranks last in the surveyed states when it comes to paying supervisory attorneys. The midpoint salary for a supervising attorney or Office Director with the DPA is \$42,084. Only two other jurisdictions (DeKalb County, Illinois, and Kansas) pay such attorneys less than \$50,000 per year. Using the midpoint figures in Table 4.7, supervising attorneys in the other 14 jurisdictions make, on average, approximately \$15,900 more per year (\$58,000 annual salary) than DPA supervising attorneys (\$42,084 per year).

Table 4.7

### Comparison of Public Defender Salaries: Supervisory Level

<u>State</u>	<u>Agency</u>	<u>Job Description</u>	<u>Salary Range</u>	<u>Midpoint</u>
Kentucky	Department of Public Advocacy	Supervising Attorney; Office Director	\$36,984 - \$47,184	\$42,084
Colorado	State Public Defender	“Significant” criminal law experience; Supervisory Attorney	\$51,880 - \$69,528	\$60,708
Delaware	State Public Defender	No set definition	\$56,000 - \$71,000	\$63,500
Illinois	Cook County Public Defender	No set definition	\$69,284	\$69,284
	DeKalb County Public Defender	No set definition	\$42,188	\$42,188
	DuPage County Public Defender	No set definition	\$53,248 - \$66,560	\$59,904
	Will County Public Defender	1 <sup>st</sup> Assistant Public Defender	\$49,567	\$49,567
Iowa	State Public Defender	Supervises fewer than 13 employees	\$57,012 - \$72,114	\$64,563
Kansas	Board of Indigent Defense Services	5-9 years with agency; Trains and assists with supervision	\$45,084 - \$47,034	\$46,059
Minnesota	Board of Public Defense	5 years experience	\$54,380 - \$77,669	\$66,025
Ohio	Public Defender Commission	1 <sup>st</sup> level supervisory attorney	\$47,944 - \$71,594	\$59,769
Oklahoma	Indigent Defense Services (Non-Capital Trial Offices)	5+ years criminal trial experience; 1+ year management experience	\$45,317 - \$63,330	\$54,324
Virginia	Public Defender Commission (Northern Virginia)	Senior Assistant	\$47,072 - \$73,491	\$60,282
	Public Defender Commission (Except Northern Virginia)	Senior Assistant	\$51,459 - \$80,339	\$65,899
West Virginia	Public Defender Services	Supervisor	Low \$50,000's	Low \$50,000's

The disparities between Kentucky's public defenders and those in other states continue to grow as one's level of responsibility rises. Table 4.8 again depicts Kentucky at the bottom of the list when it comes to paying Branch Managers or Trial Office Directing Attorneys. The high-end salary for Kentucky public defenders at this level (\$52,020) is less than the midpoint salary of every other surveyed jurisdiction. Using the midpoint salary figures, Trial Office Directing Attorneys in several states in the survey earn between \$50,000 and \$60,000 per year. In three other states, individuals earn between \$60,000 and \$70,000; several more earn between \$70,000 - \$80,000; and others between \$80,000 and \$100,000. The Public Defender of Will County, Illinois earns more than twice the salary of a DPA Division Head (\$108,050). Using the high-end range of salaries, Division Directors in Ohio, Tennessee, Virginia and West Virginia can make at least \$75,000 per year -- \$22,980 more per year than the highest paid DPA Division Head can earn.

Table 4.8 Comparison of Public Defender Salaries: Division or Office Heads				
<u>State</u>	<u>Agency</u>	<u>Job Description</u>	<u>Salary Range</u>	<u>Midpoint</u>
Kentucky	Department of Public Advocacy	Branch Manager	\$40,776 - \$52,020	\$46,398
Colorado	State Public Defender	Office Head with 10+ attorneys	\$57,204 - \$76,656	\$66,930
Delaware	State Public Defender	No set definition	\$71,000	\$71,000
Illinois	DeKalb County Public Defender	No set definition	\$53,721	\$53,721
	DuPage County Public Defender	No set definition	\$66,500 - \$83,125	\$74,813
	McLean County Public Defender	No set definition	\$80,000	\$80,000
	Will County Public Defender	Public Defender	\$108,050	\$108,050
Iowa	State Public Defender	Supervises more than 13 employees	\$65,665 - \$82,950	\$74,308
Kansas	Board of Indigent Defense Services	Supervisor	\$51,586 - \$57,460	\$54,523
Missouri	State Public Defender	District Defender	\$35,544 - \$76,380	\$55,962
Ohio	Public Defender Commission	Branch Office Manager	\$58,300 - \$85,400	\$71,850
Oklahoma	Indigent Defense Services (Non-Capital Trial Offices)	5+ years criminal trial experience; 5+ year management experience	\$52,369 - \$68,080	\$60,225
Tennessee	District Public Defender Conference	District Public Defender	\$91,152	\$91,152
Virginia	Public Defender Commission (Northern Virginia)	Public Defender	\$73,491 - \$112,145	\$92,818
	Public Defender Commission (Except Northern Virginia)	Public Defender	\$80,339 - \$112,145	\$96,242
West Virginia	Public Defender Services	Circuit Public Defender	\$58,000 - \$75,000	\$66,500

The discrepancies between the salaries of Kentucky's public defenders and other attorneys outside of Kentucky cause a number of problems for the Department of Public Advocacy. Attorneys who need to pay off student loans and/or want to support a family will find incentive to

leave the DPA system when they discover that they make more money elsewhere. Currently, there are 35 DPA attorneys facing an average student loan cost of \$39,000. The DPA had a statewide turnover rate of 12% in FY 1998, and attorney loss is even higher in the Louisville and Lexington offices, where turnover was 27% and 53%, respectively. Not only does this turnover cause morale problems for the public defenders who remain, it also creates a drain of talent which places the DPA in a continual state of hiring and training, and makes it difficult to maintain a balance between experienced and newer attorneys.

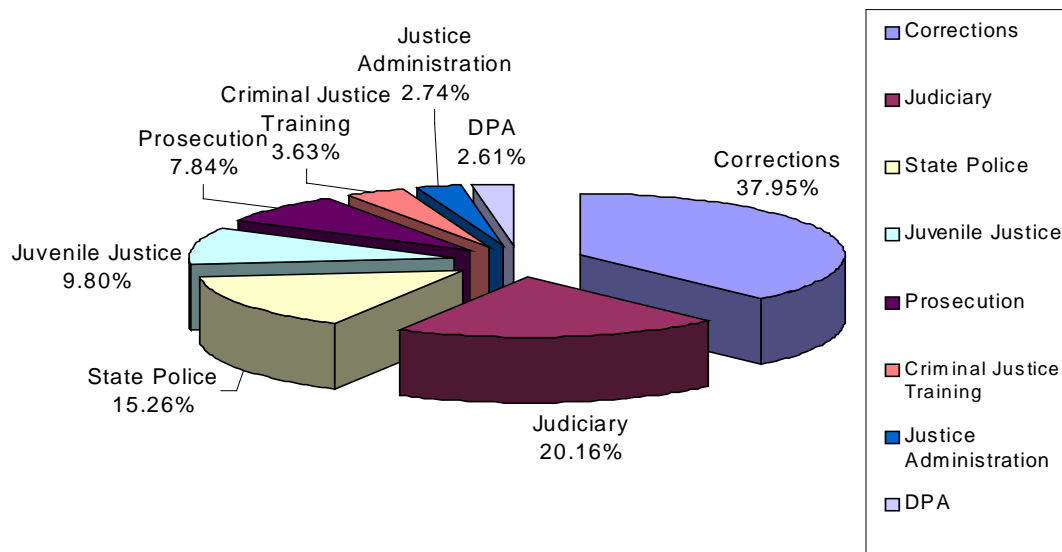
**Finding #7: All Components of the Criminal Justice System Should be Adequately Funded Particularly Public Defense. Overall the Department of Public Advocacy is Under-Funded.**

The ratio of funding between prosecution and public defense in Kentucky is approximately three to one, which is higher than in many other comparable states. It is important to point out that in this report that the Blue Ribbon Group is not stating that prosecution in Kentucky is over-funded; in fact, just the opposite may be true. What we are saying is that public defense should be adequately funded and if comparisons are to be made with other criminal justice agencies, that all expenditures from all sources be included. This disparity exists despite the fact that public defenders represent 84% of the cases prosecutors represent in circuit court.

In looking at the budget of prosecutors in Kentucky, there are no expenditure figures for the substantial amount of resources made available to prosecutors in Kentucky by all local and state law enforcement agencies through on-the-scene investigation, crime labs and other sources of state funding for prosecution. Furthermore, the prosecution has the advantage of being able to call upon federal resources such as DEA agents, FBI agents, the Federal Crime Lab, etc. The public defender, on the other hand, does not have access to these same resources. Thus the comparison of resources taking into account these important and necessary additional resources for prosecution would be substantially higher than three to one if they were able to be calculated.

As an example of this distribution of the available monies, prosecutors were funded at approximately three times greater than were public defenders in FY 1998 (prosecutors received \$55,840,000, while public defenders received \$19,023,608). The chart below illustrates this inequitable distribution.

Chart 1

**FY 1998 CRIMINAL JUSTICE BUDGETS, AGENCY PERCENTAGE**

The figures in Chart 1 are the budgeted figures for each of the criminal justice agencies for FY 1998 and not the expenditures of each agency.

The goal of salary parity embraces a trend beginning to become more common across the country, as jurisdictions adopt an “equal pay for equal work” mentality. California, Connecticut, Massachusetts, Tennessee and Wyoming are states in which public defenders are paid according to the same pay scales as prosecutors. In Tennessee, the statewide District Public Defenders Conference struggled with the problem of attorney retention until the implementation of salary parity in 1994. Raising Kentucky’s public defender salaries to the level of their courtroom adversaries will aid the DPA in its battle against turnover and the loss of talented attorneys; moreover, collaboration between the two departments will ensure that more equal justice occurs in the courtroom. Once again we point out that all components of the criminal justice system in Kentucky be adequately funded and PD21 goes far to achieve this result for public defense.

**Finding #8: The Department of Public Advocacy is Experiencing Other Effects of Chronic Under-Funding.**

The result of under-funding has taken its toll on the performance and morale of the Kentucky public defenders. The combination of heavy caseloads and low salaries has resulted in high employee turnover. Juvenile representation has suffered, and perhaps most importantly,

Kentucky has failed to complete its statewide public defender program. We believe that it is important to further detail many of the effects of under-funding.

Statewide Public Defender Program Has Not Been Completed:

When Erwin Lewis became Public Advocate in 1996, he announced his intention to increase full-time public defender coverage to 85% of Kentucky's counties. According to the Public Advocate, 80 of Kentucky's 120 counties will be served by full-time trial-level offices by July 2000. By 2004, all counties should be covered by full-time offices.

The number of contract defender programs in the United States has been increasing in the past decade. As they have become more common, concerns regarding their administration have arisen. The American Bar Association has concluded that they can be an effective method of providing indigent representation. The problems arise when contracts are awarded largely based upon cost. As ABA Standard 5-3.2 (c) states, "The contracting authority should under no circumstances award a contract on the basis of cost alone." The problem occurs when, in the effort to submit the lowest bid possible, potential contractors do not allot enough funds for their time, support services and other expenses such as expert witnesses. A full-time public defender office can also offer stability in indigent representation. Contractors may take on indigent representation work as a way to gain experience in criminal defense, or as something to spend time on while waiting for their private practice to expand. Their decision to end contracting once they have enough experience or clients can result in a lack of continuity in the provision of indigent representation.

The contracting system in Kentucky has had its problems since it was mandated in the early 1980's when the assigned counsel program was eliminated due to the constantly increased costs. While many contract attorneys have performed outstanding work over the years, the overall performance has been uneven. Sufficient funds have not been available for many contractors to spend the time necessary on each case assigned. For many, there is a financial disincentive to go to trial or spend significant time on serious and complex cases. Some conflicts have occurred when contractors have given more attention to their private retained clients than their assigned counsel cases. In addition, little education is required for the contract attorneys and many have complained that they have had trouble obtaining experts or investigators in appropriate cases.

Reports have been made by judges and others that, in some counties, contractors are simply not available for all appointments, particularly in juvenile delinquency and minor misdemeanor

cases. This may answer some of the questions we have heard about numbers of indigent eligible defendants receiving no counsel in some areas of the state.

Further evidence of contractor deficiencies can be found when DPA opens new public defender trial offices and notices a sharp increase in caseload compared to the prior contract program. Finally, when contracts exist in 40 or more counties, it is virtually impossible for DPA to monitor and oversee the performance of counsel. There is no sufficient supervisory or evaluative system available given the funding crisis.

### Juvenile Representation Has Suffered

There is substantial evidence that because of serious under-funding, representation in juvenile delinquency cases has suffered. In December of 1995, the Children's Law Center, located in Covington, Kentucky, conducted a statewide study of juvenile delinquency representation to assess the quality and recommend action for improvement. Among the findings are the following:

- The size of caseloads in some areas of the state provides serious limitations on the ability of lawyers to adequately represent their clients. [Information supplied by the DPA for FY 1998 indicates that in Louisville, full-time public defenders averaged 843 juvenile clients per lawyer. In Lexington, the comparable number is 1,198 juvenile clients per full-time attorney.]
- Contract attorneys, unlike DPA attorneys, do not have adequate educational opportunities and both groups are hampered by a lack of social services such as research support and access to mental health experts or social workers.
- Juveniles too often waive their right to counsel completely or at various critical stages of the proceedings. Waiver is occurring at times because of the unavailability of attorneys.
- Juveniles do not appear to get adequate time with their lawyers before or during proceedings. Often counsel is not appointed until arraignment, even where the juvenile has been detained.
- Trial representation and motion practice appear to be lacking due to time constraints and the somewhat informal nature of the proceedings.
- Juvenile appellate cases and other post-dispositional remedies appear to be nearly non-existent.

In response, DPA included improved juvenile representation in their 1998-2000 plan. This has included the creation of five new DPA offices with improved juvenile representation; seven

new trial attorneys located in existing regional offices; two additional full-time appellate lawyers specializing in juvenile appellate cases in the central Frankfort office; and an assistant trainer focused on education of juvenile litigators in contract and full-time counties.

This commitment, while laudatory, should be viewed as only the first important step by DPA to address the problems on a statewide level.

**Finding #9: Without Additional General Fund Revenues, a Deficit will Occur in the Non-General Fund Account On or Before July 1, 2000.**

The non-general fund revenue stream has in the past few years funded over 15% of the program service delivery for DPA. Currently, this revenue stream (comprised of DUI, administrative, and recoupment revenues) funds many of DPA's programs, including staff offices in Covington, Bell, Elizabethtown, and Henderson, Kentucky. It also funds much of the capital trial and capital post-conviction work.

We have stated previously in this report that we believe available revenue is considerably tapped out. Thus, if the current level of revenue collections is only maintained, DPA's projection is that a deficit in the account will occur on or before July 1, 2000. This of course would add to the chronic under-funding and require either additional funding or a plan to close programs.

**Finding #10: The Appellate Branch is Limited in its Ability to Handle the Workload in the Court of Appeals and the Supreme Court.**

At the present time, the Appellate Branch handles all Kentucky Supreme Court cases. In FY 1998, 126 of those cases came into the Department, of which 7 were capital appeals.

The Appellate Branch is only able to handle a portion of the appeals entered in the Court of Appeals. The rest are handled by of-counsel attorneys who are paid \$25 per hour for out-of-court work and \$35 per hour for in-court work. Currently there is a maximum allowable payment per case of \$850, which can go up to \$1,000 in a case with an unusually long videotaped record.

It is important to note that the Attorney General's office, responsible for the Commonwealth's appeal, has 26 attorneys in its criminal appellate division compared to only 12 full-time attorneys at DPA.

It is clear that an increased staff of full-time appellate attorneys at DPA would not only raise the overall quality of defense representation in the Court of Appeals but would also be more cost-effective than of-counsel. Under PD21, the addition of six more attorneys would permit DPA to handle at least half of all of the criminal appeals in the Court of Appeals and all of the Supreme Court cases.

**Finding #11: The DPA Post-Conviction Branch is Unable to Provide Representation to Hundreds of Inmates Who Have the Right to Counsel in Kentucky.**

The rights of defendants in correctional centers around the state can be found in various Kentucky statutes and federal consent decrees. Growing out of prison litigation in Kentucky has come a clearly defined recognition that inmates have a constitutionally protected right of "meaningful access to the courts." Post-conviction attorneys also provide many hours of service to Corrections by working with and having inmate legal aides. Corrections has relied heavily upon DPA to provide monitoring and training for their aides.

In addition to achieving release in appropriate cases, the attorneys, while in the institution, give the inmates a vehicle to pursue remedies and/or problems of confinement; their presence gives inmates an outlet for addressing complaints.

Post-conviction attorneys are also able to assist many defendants who feel their grievance has a legal basis, when it may not. The fact that defendants have ready access to their attorneys clearly results in some cases not being filed that otherwise might find their way to the courts on a

*pro se* basis. At the present time, the Post-Conviction Branch is not staffed to provide access to the courts for inmates being held in county jails as Class D felons or awaiting a prison bed (controlled intake). PD21 provides a reasonable plan which would allow access to the courts.

**Finding #12: As DPA Moves Toward a Fully Staffed Statewide Program, the Demands on the Law Operations Division (LOPS) Will Grow Dramatically. Currently, the Number of Staff at LOPS Will Need to be Expanded During the Implementation of PD21.**

The major functions performed by LOPS number more than 20 and are set out on page 30 of DPA's "Plan for Delivery of Trial Services, Post-Trial, Administrative Support in the 21<sup>st</sup> Century," dated April 1999.

As part of the plan, DPA proposed to reorganize LOPS into five branches: Human Resources, Information Systems, Fiscal Operations, Operations, and Education and Development. This well-thought out and necessary action would require the addition of only nine staff, most of whom would be technical in nature. The reorganized branches and staff would be consistent with statewide public defender systems in other parts of the country.

**Finding #13: Compensation for Private Bar Members Who are Appointed to Conflict Cases is Among the Lowest in the Country.**

Compensation to private attorneys in conflict cases is a necessary part of the overall indigent defense system in Kentucky. In 1998, the state legislature assigned the responsibility of establishing rates of private court-appointed counsel to DPA. However, funding has limited the payment of conflict representation to an approximately \$300 per case average. At this level, many of the problems set out in the section on contracting can be found in some parts of the state. To assure quality of counsel and sufficient number of conflict counsel, particularly in the rural areas of the state, increased funding for conflict counsel must occur.

**Finding #14: Department of Public Advocacy Representation in Capital Cases Must Occur at the Trial, Direct Appeal, State Post-Conviction and Federal Habeas Corpus Level. As the Numbers of Death Penalty Case Filings Occur and Previous Cases Work Their Way Through the Four Stage Process, Additional DPA Resources Are Needed.**

Each capital case assigned to DPA has the potential of being litigated at four separate levels in the state and federal criminal justice systems. These cases are among, if not the most, complex that staff will deal with over time. They also have the potential for exacting the most severe penalty that the Commonwealth allows.

DPA has chosen, for the most part, to provide representation in these cases by full-time, experienced death penalty lawyers, almost always working together in a central location- usually Frankfort. PD21 would suggest some appropriate reorganization, particularly at the trial level with two capital trial lawyers for each trial region. Payment to private attorneys in capital cases would rise to \$20,000, still below most of the comparable states that have the death penalty.

It is clear that the number of capital cases reaching the state post-conviction level is on the rise and will require an increased staff. Similar concerns exist at the appellate level. Representation of capital defendants in Kentucky is clearly in need of additional experienced capital attorneys and other resources, particularly as the number of these cases is growing.



## Chapter 5

**Recommendations**

**Recommendation #1:**      **Indigent Defense is a Necessary Function of Government, and an Essential and Co-Equal Partner in the Criminal Justice System.**

**Recommendation #2:**      **The Kentucky Public Defender System Cannot Play its Necessary Role for Courts, Clients, and the Public in this Criminal Justice System Without Significant Increase in Funding.**

Without proper funding, public defenders and court-appointed counsel must face ever-burgeoning caseloads without adequate support services. As such, we recommend that the Department of Public Advocacy receive a significant increase in funding to bring Kentucky into the median range of comparable states in regards to indigent defense cost-per-case and cost-per-capita.

As stated in Chapter 4, Kentucky ranked last in cost-per-case out of the twelve states for which we obtained FY 1998 information. Once again, Kentucky ranked sixth in total cases and eleventh in total expenditure. If the DPA were to receive an \$11.7 million increase (up to \$30,723 million), Kentucky would move to number seven of the list of comparable states in regard to indigent defense expenditure (See Table 5.1). Such an increase would raise the state's cost-per-case figure to \$303.56. This new cost-per-case figure would only move Kentucky to ninth on the list.

Two factors must be considered in such an analysis. First, the new Kentucky cost-per-case figure was determined using FY 1998 caseloads which are expected to increase in future years. Second, as the DPA receives an increase in indigent defense expenditure, the other survey states too will receive increases. As such, Kentucky's expenditure increase is even more reasonable.

The \$11.7 million increase will also raise Kentucky's cost-per-capita figure (\$7.91). Under such a scenario, Kentucky would move to eighth on the list of comparable states. This again is appropriate considering that Kentucky would rank seventh in both population and indigent defense expenditure.

Table 5.1

**Comparison of FY 1998 Indigent Defense Cost-Per-Case & Cost-Per-Capita  
(Assuming an \$11.7 Million Increase for Kentucky)**

Cost-per-case				Cost-per-capita			
State	Total Cases	Expenditure	Cost-Per-Case	State	Population (1996)	Expenditure	Cost-Per-Capita
KY*	101,210	\$30,723,723 (projected FY 2001)	\$303.56	KY*	3,883,723	\$30,723,723 (projected FY 2001)	\$7.91
KS*	24,876	\$13,701,308	\$550.78	WI	5,159,795	\$62,601,951	\$12.13
WI	117,075	\$62,601,951	\$534.72	IA	2,851,792	\$29,373,684	\$10.30
IA	62,102	\$29,373,684	\$472.99	CT*	3,274,238	\$33,096,382	\$10.11
CO*	69,635	\$29,289,326	\$420.61	DE*	724,842	\$7,047,920	\$9.72
CT*	85,575	\$33,096,382	\$386.75	MN	4,657,758	\$45,108,000	\$9.68
NC*	154,148	\$58,622,732	\$380.30	FL*	14,399,985	\$123,593,616	\$8.58
MO*	76,034	\$24,727,622	\$325.22	NC*	7,322,870	\$58,622,732	\$8.01
OK*	59,241	\$19,226,832	\$324.55	CO*	3,822,676	\$29,289,326	\$7.66
MN	185,518	\$45,108,000	\$243.15	TN*	6,675,451	\$35,817,993	\$6.73
TN*	151,827	\$35,817,993	\$235.91	OK*	3,300,902	\$19,226,832	\$5.82
DE*	35,329	\$7,047,920	\$199.49	KS*	2,572,150	\$13,701,308	\$5.33
<sup>17</sup> FL*	223,132	\$123,593,616	\$193.93	MO*	5,358,692	\$24,727,622	\$4.61
* = Death Penalty States				* = Death Penalty States			

The conclusion to be drawn from these figures is that an increase in the DPA's funding is both necessary and reasonable. Kentucky currently ranks at, or near, the bottom of both cost-per-case and cost-per-capita statistics. Supplementing the DPA budget by \$11.7 million will bring Kentucky up to a more comparable position on the national scene, and equip public defenders with the resources they need to provide competent representation.

**Recommendation #3: The Full-Time System Should be Completed.**

**Recommendation #4: Higher Salaries Should Be Paid to Defenders and Prosecutors; Salary Parity is the Goal.**

<sup>17</sup> Florida's FY98 data includes assigned counsel cases. Expenditure data for assigned counsel is unavailable. If assigned counsel expenditure data was available, FL's cost-per-case would be higher.

- Recommendation #5:**      **Loan Forgiveness Programs Should Be Made Available to Prosecutors and Defenders.**
- Recommendation #6:**      **Full-Time Trial Staff Should Be Increased to Bring Caseloads Per Attorney Closer to the National Standards. The Figure Should Be No More Than 350 in Rural Areas and 450 in Urban Areas.**
- Recommendation #7:**      **The Department of Public Advocacy and the Court of Justice Must Increase their Efforts to Collect Reasonable Fees from Public Defender Clients, Including Considering the use of Private Collection Organizations.**
- Recommendation #8:**      **Prosecutor and Defender Increases Should be Considered when a Judicial Position is Added.**
- Recommendation #9:**      **It is Important that Public Defender Counsel be Available to Children in Juvenile Court Proceedings.**
- Recommendation #10:**      **It is Imperative that Kentucky Reasonably Fund Indigent Capital Defense both at the Trial and Post-Trial Levels.**
- Recommendation #11:**      **Public Defender Services are Constitutionally Mandated while Resources are Scarce. It is Important for all Eligible Persons who want to be Represented by a Lawyer, but only those who are Eligible to be Appointed a Public Defender. The Court of Justice, and Especially AOC and DPA are Encouraged to Work Cooperatively to Ensure Appropriate Public Defender Appointments.**
- Recommendation #12:**      **The \$11.7 Million Additional Funding for Each of the 2 Years Is Reasonable and Necessary to Meet DPA's Documented Funding Needs as Described in PD21. \* See Appendix C.**

Reprint of an article which appeared in  
the *Louisville Courier Journal* on April  
11, 1999.

## Chapter 6

**Conclusion**

Over the last several months, The Spangenberg Group has had an opportunity to look at the central administrative arm of the Department of Public Advocacy to see if they are managing their resources efficiently and looking for other sources of funding to add to the general fund appropriation. We believe that DPA's leadership has done, and is doing, all it can with the limited available resources to improve administration and efficiency. Having said this, it is obvious to The Spangenberg Group that there are also risks involved in the next biennium if the DPA's level of funding is not increased to that recommended by the Blue Ribbon Group. Among these risks are the following:

- The statewide full-time plan will fail and a large number of counties will continue to be served by part-time contract attorneys unable to assist the judges in keeping the docket moving and not providing required counsel to some juvenile delinquents and misdemeanants.
- An even larger number of lawyers and support staff will leave the program and seek other employment due to the woefully inadequate salaries available.
- Full-time public defender caseloads will increase to the breaking point, particularly in cities such as Louisville.
- DPA will not be able to provide representation to all indigent defendants in the state and will have to develop policies regarding courts that they cannot serve.
- Cases will have to be retried because of the inadequacy of counsel or the lack of counsel completely.
- The community will be frustrated, as well as all other criminal justice agencies because public defenders cannot perform their required tasks adequately.
- Without substantial additional funding, there is a likely risk that the Commonwealth of Kentucky could not adequately defend a statewide systemic lawsuit due to the inadequate resources and overwhelming caseload.

The Spangenberg Group firmly believes that the requested amount of \$11.7 million is reasonable, necessary and required. PD21, and the work of the Blue Ribbon Group, is one of the most impressive undertakings that TSG has witnessed over the last 15 years of working in all 50

states. It is sound and responsible government at its best. In our judgement, it is time for the Commonwealth to accept its responsibility to provide substantially increased funds for the DPA through a general fund appropriation.

## ***APPENDICES***



## Appendix B

### Colorado

1996 Pop.: 3,822,676

No. of Counties: 63

The state-funded Colorado State Public Defender provides representation to indigent defendants in Colorado from its regional trial offices and central appellate office. Conflict of interest cases are handled by appointed counsel who qualify for inclusion on the list of eligible attorneys maintained by the state-funded Alternate Defense Counsel, which is a separate organization that pays private court appointed counsel in these cases. All funds for indigent defense in Colorado are state funds.

### Connecticut

1996 Pop.: 3,274,238

No. of Counties: 8

The state-funded Connecticut State Public Defender and Special Public Defenders (SPDs) - private attorneys who contract with the public defender to handle conflict and overload cases - provide virtually all indigent defense representation in Connecticut. The Public Defender has regional offices throughout the state.

There is a capital trial level division and an appellate division. All funds for indigent defense in Connecticut come from the state.

### Delaware

1996 Pop.: 724,842

No. of Counties: 3

The Delaware State Public Defender represents all indigent defendants in trial and appellate cases. The Public Defender has regional offices throughout the state, and the state pays all expenditures for indigent defense. Conflict cases are primarily handled by a pool of six private attorneys who contract with the state to handle conflict cases. The annual, flat-fee contracts are for \$41,000 (per attorney), not including work on capital and non-capital murder cases, which usually adds another \$20,000 per year. The contract program is administered by a circuit court judge, who selects the contract attorneys.

### Florida

1996 Pop.: 14,399,985

No. of Counties: 67

Florida has 20 publicly elected circuit public defenders serving the state's twenty judicial districts. Additionally, there are five appellate defender programs that represent indigent clients in Florida's five courts of appeal. In Florida, public defender salaries are funded by the state while the counties are responsible for funding public defender overhead expenses (office space, utilities, telephone, etc.) and the cost of court-appointed counsel in conflict cases. Although each public defender must develop an individual budget for his or her office, the twenty circuit defenders have formed the Florida Public Defender Association (FPDA), an organization that allows the public defenders to work together to seek state appropriations for indigent defense services statewide.

The state also funds the Capital Collateral Representative (CCR), a statewide entity that represents indigent inmates in capital post-conviction proceedings in state and federal court. Originally one program located in Tallahassee, in October of 1997, the CCR was split into three independent entities covering Florida's northern, central and southern regions.

In addition to state and county funds, Florida began collecting a public defender application fee from indigent defendants beginning in January of 1997. Any accused person or legal guardian of an accused minor who files an affidavit declaring indigency and requesting representation by a public defender must pay a \$40 fee at the time the affidavit is filed. Fees collected are deposited into the Indigent Criminal Defense Trust Fund and are to be used to supplement the state appropriation for public defenders.

Indiana1996 Pop.: 5,840,520No. of Counties: 92

Prior to 1992, the only state funding for indigent defense in Indiana supported the Public Defender of Indiana, a state-wide entity that represents indigent defendants in direct appeals and state post-conviction proceedings. In 1992, the state appropriated funding for the Indiana Public Defender Commission (IPDC) to help defray the cost of providing indigent defense services in capital cases among those counties which meet the Indiana Supreme Court's standards in Criminal Rule 24. In 1995, the IPDC received additional state funds and issued standards for non-capital cases. Counties that enforce commission standards are reimbursed by the IPDC for 40% of the cost of representing indigent defendants in non-capital felony cases and 50% of the cost of attorney's fees, as well as expert, investigative and support services, in capital cases.

State funds also support the Indiana Public Defender Council, a state agency that produces training manuals, publications, a monthly newsletter and provides information in an electronic format to indigent defense practitioners. They also handle all state post-conviction capital and non-capital and direct appeals if requested by the counties.

Iowa1996 Pop.: 2,851,792No. of Counties: 99

In Iowa, since 1989, the state has assumed the entire cost of providing indigent defense services, replacing counties as the primary providers. The move coincided with the creation of a state-funded, unified court system. The state public defender oversees all indigent defense payments, including those for staff offices (there are 17 trial-level offices throughout the state), attorneys working under contract with the public defender and attorneys who accept court-appointed cases. There is also a separate appellate division within the statewide organization. Iowa does not have the death penalty.

Kansas1996 Pop.: 2,477,547No. of Counties: 15

The state-funded Kansas Board of Indigents Defense Services (BIDS) is responsible for all indigent defendant felony and appeal cases, while the state's counties retain responsibility for funding and providing counsel for misdemeanor and juvenile cases. BIDS maintains regional offices throughout the state, while misdemeanor and juvenile representation is provided by county contract defenders and assigned counsel.

The Kansas Board of Indigent Defense Services was allocated \$13,798,232 for its FY 1999 budget. This is a \$131,436 reduction from its FY 1998 budget (\$13,949,668). The Board hopes to secure a supplemental appropriation during the next legislative session.

Massachusetts1996 Pop.: 6,092,352No. of Counties: 14

Massachusetts' state-funded Committee for Public Counsel Services (CPCS) oversees the statewide indigent defense system. The public defender division handles serious felony trial and direct appeal cases, and has offices in each of the state's counties. All misdemeanor cases and most juvenile delinquency cases are handled through CPCS-administered contracts with county bar advocate programs which utilize private assigned counsel.

Massachusetts has a \$100 administrative fee, which is administered by local probation departments. The money collected, along with that produced by recoupment, reverts back to the General Fund.

Minnesota1996 Pop.: 4,657,758No. of Counties: 87

All indigent defense services in Minnesota are state funded and under the supervision of the Board of Public Defense, established statewide a number of years ago. Each judicial district

in Minnesota has a regional state office and the District Defender is appointed by the Board as is the State Public Defender. The state agency also maintains an appellate division. There is no death penalty in Minnesota.

Missouri1996 Pop.: 5,358,692No. of Counties: 114

The state-funded Missouri State Public Defender system provides representation to indigent defendants in all criminal cases. The State Public Defender has three divisions that provide representation to indigent defendants at trial, appeals and in capital proceedings. The Public Defender maintains 35 regional offices to handle trial cases throughout the state and three appellate offices. There is also a statewide capital trial unit within the system.

New Jersey1996 Pop.: 7,987,933No. of Counties: 21

The state-funded New Jersey State Public Defender is a statewide program which is responsible for all indictable felony offenses and juvenile delinquency cases in New Jersey's thirteen county-based superior courts, along with direct appeals from these cases. The Public Defender maintains regional offices covering each of New Jersey's 21 counties, and uses the revenue collected by a \$50 up-front fee to offset the cost of providing indigent defense services.

Until recently, the state's counties were responsible for providing counsel to indigent defendants at the municipal level in misdemeanor cases. Despite a state supreme court decision in which the court held that attorneys representing indigent defendants in municipal court are not entitled to compensation, *Madden v. Delran Twp.*, 126 N.J. 591 (1992), in 1997, legislation established a funding mechanism for those municipal courts which did not employ a municipal public defender. The legislation authorizes the collection of a waivable application fee of up to \$200, payable over a four-month period, for individuals seeking the services of a municipal public defender. Funds collected through the application fee are deposited in a dedicated fund to be used exclusively to meet all costs incurred in providing indigent defense services at the municipal court level, including the cost of expert investigation and testimony.

New Mexico1996 Pop.: 1,713,407No. of Counties: 33

New Mexico's state-funded Public Defender Department provides primary representation in trial and appellate cases throughout the state. Approximately half of the state's counties (the more populous ones) are served by one of the State Public Defender Department's regional trial offices; private attorneys who contract with the Department represent indigent defendants in the remaining counties. There is a separate appeals division in the Public Defender Department.

North Carolina1996 Pop.: 7,332,870No. of Counties: 100

In North Carolina, the state pays for all indigent defense expenditures. Trial level representation is provided at the local level; each county has the responsibility of organizing its system. A handful of the state's 100 counties employ the public defender model while the rest use assigned counsel or contract defenders. Appellate representation is provided by the State Appellate Defender.

Ohio1996 Pop.: 11,172,782No. of Counties: 88

The Ohio Public Defender Commission provides direct representation in most direct appeal and state post-conviction cases. The Commission also oversees the delivery of non-capital trial level services throughout the state. Ohio's counties may select their own delivery model (public

defender, assigned counsel or contract), and those counties which comply with the Commission's standards are eligible for partial reimbursement for expenditures in connection with these services.

Ohio's indigent defense system is funded through a combination of county and state monies. As mentioned above, the state-funded Public Defender Commission reimburses counties up to 50% of their expenditure, but the rate of reimbursement fluctuates each year, depending on the Commission's budget. Generally, it is between 40% and 50% of the amount paid by the county. This program is supported in large measure by an \$11 assessment on all criminal convictions other than minor traffic offenses; the assessment is added to the bail premium of all defendants who post bond or at the disposition of the case if no bail is posted. Capital cases are handled by county public defenders or appointed counsel at trial and the Commission handles capital cases at the direct appeal and post-conviction level.

#### Oklahoma

1996 Pop.: 3,300,902

No. of Counties: 7

In Oklahoma's two largest counties, Tulsa and Oklahoma (Oklahoma City), the counties fund indigent defense services at the trial and direct appeal levels. Both counties have full-time public defender offices.

In 1991, the Oklahoma legislature created and funded a new state agency for providing indigent defense services, the Oklahoma Indigent Defense System (OIDS). OIDS, with its five-member Board of Directors, is responsible for providing indigent defense services in 74 of Oklahoma's 77 counties. OIDS has separate, staffed capital trial, capital direct appeal, non-capital direct appeal and capital state post-conviction divisions. The majority of non-capital trial cases are handled by attorneys working under contract with OIDS.

Following the 1997 legislative session, OIDS opened three non-capital trial satellite offices, and, in the 1998 legislative session, received funds to expand one of the three offices.

#### Tennessee

1996 Pop.: 5,319,654

No. of Counties: 95

In Tennessee, with the exception of Shelby County (Nashville) and Davidson County (Memphis), which have their own respective county public defender offices funded through a combination of state and local monies, the state funds indigent defense and each judicial district has an independently elected public defender. The Tennessee District Public Defenders Conference oversees the delivery of indigent defense services throughout the state. Another program, the Office of the Post-Conviction Defender, represents indigent defendants convicted of capital offenses who are seeking state post-conviction relief.

#### Virginia

1996 Pop.: 6,675,451

No. of Counties: 95

In Virginia, where the state fully funds indigent defense; trial and appellate representation is provided either by attorneys from 20 regional public defender offices (serving about one-third of the state) or by appointed counsel, who handle conflicts from the public defender offices and cases filed in the other counties of the state.

In Virginia there is a Public Defender Commission which maintains data and oversees the regional public defender offices.

#### West Virginia

1996 Pop.: 1,825,754

No. of Counties: 55

In West Virginia, 100% of the statewide indigent defense funding comes from a general-fund appropriation. Since 1989, West Virginia Public Defender Services (PDS) has administered, coordinated and evaluated local indigent defense programs in the state's 31 judicial districts. PDS also provides training and technical assistance to indigent defense providers and operates an

appellate division to represent indigent defendants in appellate cases in the supreme court. The Executive Director of PDS is authorized to make grants to and contract with public defender corporations in those judicial districts in which the chief judge and/or the majority of active local bar members has determined a need for a public defender office. Currently, 23 of West Virginia's 55 counties are served by 15 public defender corporations. The remaining 32 counties rely solely on assigned counsel to provided representation to indigent defendants.

Wisconsin      1996 Pop.: 5,159,795

No. of Counties: 72

All indigent defense funds are state funded in Wisconsin and administered by the Wisconsin State Public Defender System through a number of regional offices. There is also an appellate division for the system. Wisconsin does not have the death penalty.

## *Appendix C*

### Blue Ribbon Group Funding Recommendations/Initiatives Summary 2000-2002 Biennium

Initiative	Est. FY 01 Cost	Est. FY 02 Cost	Est. Biennial Cost
Revenue Fund Deficit	\$400,000	\$400,000	\$800,000
Juvenile Enhancement/Completion of Full-Time System			
• Expansion of full-time system to all counties	\$1,285,800	\$1,218,900	\$2,504,700
• Caseload reduction	\$1,902,000	\$1,838,800	\$3,740,800
• Infrastructure expansion	\$512,600	\$494,600	\$1,007,200
• Appellate Branch expansion	\$307,200	\$288,800	\$596,000
• Conflict Case Rate increased to \$300 per case/Of Counsel Rate increased to \$3,000 per case	\$294,600	\$294,600	\$589,200
• Additional Field Office support staff	\$923,800	\$855,600	\$1,779,400
• Additional Investigator staff	\$102,300	\$82,100	\$184,400
• Law clerks	\$50,000	\$50,000	\$100,000
Fundamental Fairness for Public Defender Salaries			
• 30% salary increase	\$3,247,900	\$3,345,300	\$6,593,200
• Loan forgiveness program	\$150,000	\$150,000	\$300,000
Adequate Funding for Capital Defense	\$1,712,300	\$1,619,000	\$3,331,300
Insured Access to Courts for Adults and Juveniles	\$447,200	\$422,500	\$869,700
Equipment Replacement Cycle	\$394,650	\$316,489	\$711,139
<b>TOTALS</b>	<b>\$11,730,350</b>	<b>\$11,376,689</b>	<b>\$23,107,039</b>